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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 984

HARRY S. STARK and NATIONAL BANK OF DETROIT,
Co-Executors of the Estate of Louise Tuller Miller,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on September 24, 1965.

CITATIONS OF OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, entered January 16, 1964, is reported in 228 F. Supp. 203, in 64-1 U.S.T.C. 9280, and in 13 AFTR 2d 915, and is appended as Appendix B.

The Opinion of the United States Court of Appeals for the Sixth Circuit entered September 24, 1965, is reported in 351 F. 2d 160, in 65-2 U.S.T.C. 9230, and in 16 AFTR 2d 5642, and is apended as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked on the following grounds. The Judgment of the Court of Appeals for the Sixth Circuit was entered September 24, 1965. A timely petition for rehearing was denied by that Court by Order entered November 9, 1965. Jurisdiction is conferred on this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether in a suit for refund of federal income taxes in which the only issue was whether the taxpayer was married (and therefore entitled to file joint tax returns and to claim as deductions substantial medical expenses incurred by taxpayer for her husband), a final unappealed order of the State Probate Court having jurisdiction over the interested parties' estates and over the subject matter is con-

clusive as to the issue of the marriage for the purpose of determining the imposition of federal income taxes.

Whether in such a suit, where petitioners relied on the Order of the State Court and in which the respondent offered no evidence, there was such a failure of proof as to permit the Trial Court to grant respondent's motion to dismiss under Rule 41 of Fed. Rules of Civil Procedure.

STATUTES INVOLVED

The statutes involved are Sections 6013 and 213 of the Internal Revenue Code of 1954 relating to the filing of joint returns and the deduction of medical expenses. The pertinent Sections are contained in Appendix A.

STATEMENT OF THE CASE

Petitioners commenced this action in the United States District Court for the Eastern District of Michigan to recover federal income taxes erroneously assessed and paid. Claims for refund were filed by petitioners' decedent and by petitioners and disallowed by the Commissioner of Internal Revenue on the grounds that decedent was not married and therefore not entitled to joint filing with her husband and not entitled to claim substantial medical expenses incurred by decedent on his behalf. The only issue in the District Court was the existence of the marriage.

On the trial, the petitioners introduced the certified record of the Probate Court of Wayne County, Michigan, in the estate of the husband, Finley P. Miller, who is hereafter referred to as Finley. The probate record included

an Order of that Court determining that the parties were in fact married during the period relevant to the income tax refund claim and that decedent was the sole heir of her husband.

Petitioners relied upon that Order as determinative of the question of marriage, or at the very least, determinative until overcome by competent evidence.

Without presenting any evidence, respondent moved to dismiss. The District Court entered its Opinion (Appendix A) holding it was not bound by the Probate Court proceeding and entered Judgment for respondent.

The Court of Appeals for the Sixth Circuit affirmed and denied a rehearing.

A concise chronology of the pertinent and undisputed facts in the probate record is as follows:

May 28, 1960, Finley P. Miller died intestate with estate of $24,000; age, 90-95 years.

June 9, 1960, petitioners' decedent filed petition for administration, identifying herself as widow and sole heir and also filed a petition for determination of herself as sole heir.

September 10, 1960, petitioners' decedent died; age, approximately 85 years.

October 7, 1960, Michigan Attorney General filed petition claiming Finley had no heirs and that estate should escheat; this was withdrawn January 19, 1961, when 19 relatives of Finley were located.

January 30, 1960, petitioners filed claim in Finley's estate for $72,000 for medical expenses paid for by decedent; these were same expenses which were the subject of the income tax refunds; this claim was filed because In-

ternal Revenue Agents demanded a gift tax to be paid on these sums and because petitioners did not know what the result of the petition for determination of heirs would be. All kin of Finley and the Michigan Attorney General were notified; a guardian ad litem was appointed. The claim was allowed, exhausting Finley's estate except for $100 left to cover administration expenses.

January 9 and 30, 1962, the Probate Court conducted hearings upon decedent's petition that she be determined to be the sole heir of Finley; the kin of Finley and the Michigan Attorney General were notified; 9 witnesses testified in person, 18 by deposition, including the parties' physician for 5 years, their chauffeur for 8 years, Finley's tailor for 45 years, an auto dealer who had known the parties in the 1930's, and a retired hotel porter who had known Finley 40 years and decedent 30 years.

Hospital records showing that as early as 1930 Finley had identified decedent as his wife on admittance and other hospital records in which decedent identified Finley as her husband were introduced. Considerable other oral and written evidence was introduced in the Probate Court.

No kin of Finley appeared at the hearing. The Attorney General was represented at the taking of some depositions, and an Internal Revenue Agent was present January 9, 1962, at the Probate Court hearing. He took no part but conferred in chambers with the Probate Judge. After which the Probate Judge continued the matter until January 30, 1962, and advised the Agent in open court that he was giving the Internal Revenue Service an opportunity to contest the proceedings or to abide by them.

March 1, 1962, the Probate Court entered an Order determining decedent to have been the widow and sole heir of

Finley and that the marriage predated January 1, 1957, the effective date of a Michigan statute precluding the contracting of common law marriages.

January 10, 1963, the residue of Finley's estate consisting of $86 was assigned to decedent as sole heir.

On the trial petitioners introduced the probate record, including transcripts of all testimony and depositions and all exhibits pertinent to the determination of heirs, not to prove the marriage by hearsay, but to show the character of the proceedings leading to the pertinent Order determining heirs which petitioners then argued and continue to argue was a binding Order of a State Court, in a matter purely local in character and in which the State Court had jurisdiction over the subject matter and the parties.

REASONS FOR GRANTING THE WRIT

There Is a Substantial Question of the Respective Jurisdiction of State and Federal Courts

This Court has on two occasions decided the fundamental issue raised by the instant case: Is a final state court order issued by a court of competent jurisdiction in a matter properly before that court determinative as far as the question involves state law in subsequent tax litigation?

In *Frueler, Administrator, v. Helvering, Commissioner of Internal Revenue,* 291 U.S. 35 (1934), this Court held that an order of a California court regarding the distribution of trust income was conclusive in later income tax litigation.

In *Blair v. Commissioner of Internal Revenue*, 300 U.S. 5 (1937), this Court held that a state court judgment which held that an interest in a trust was assignable was binding in subsequent tax litigation.

In both of these cases, the Court held that to derogate from the authority of the state court orders, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

For almost 30 years, the Courts of Appeals, the District Courts, and the United States Tax Court have interpreted, reinterpreted, stated, and reinstated the rule enunciated in the *Frueler* and *Blair* cases. So confused is the issue now that the Commissioner of Internal Revenue cites these cases as authority for ignoring state court decisions, even though both cases resulted in decisions for the taxpayer, and the *Blair* case exemplifies almost every major objection raised by the Commissioner to the finality of state court orders and judgments.

The underlying question of the respective jurisdictions of state and federal courts has been muddied by a whole series of objections raised by the Commissioner over the years and by conflicting and contradictory decisions of the various Courts of Appeals. In most of the cases, the Commissioner has raised these objections to the finality of state court orders.

1. The state court did not determine property rights.

2. The government cannot be bound by a state court proceeding to which it was not a party.

3. The proceedings in the state court were nonadversary, ex parte, collusive, or by consent.

4. The state court proceeding was motivated or initiated to obtain favorable tax consequences.

Among the reported decisions, there is a case supporting almost any point of view. The courts have lost sight of the jurisdictional questions.

The effect of overturning or ignoring state court orders is that the interested parties are bound by these decisions but the Commissioner is not, and our state courts are subject to a case by case collateral attack and review.

In the instant case, the State Court has held that petitioners' decedent was the widow and sole heir. Any after-discovered property of her late husband would therefore belong to decedent. The Commissioner's Revenue Ruling 58-60, Cumulative Buletin, 1958, page 60, states that a common law marriage recognized by state law is so recognized for income tax purposes. Nonetheless, petitioners' decedent was not married so far as the Commissioner is concerned.

There Is an Almost Complete Divergence of Opinion Among the Circuit Courts of Appeals

The following may demonstrate the confusion that exists.

In *Faulkerson Estate v. United States*, 301 F. 2d 231 (C.A. 7th Cir. 1961), the Seventh Circuit Court of Appeals held that an *ex parte* nonadversary decree of a state court that a widow was sole heir and took an estate absolutely rather than a life estate was therefore collusive and not binding upon the federal court. That court cited the *Frueler* and *Blair* cases without comment and proceeded to ignore both.

Flitcroft v. Commissioner, 328 F. 2d 449 (C.A. 9th Cir. 1964), held that proceedings were not collusive where the Commissioner was made a party in the state court proceedings, even though the Commissioner was later dismissed as a party.

In the case of *Gallagher v. Smith,* 223 F. 2d 218 (C.A. 3rd Cir. 1955), the Third Circuit Court of Appeals held that where the state court adjudicated property rights, it mattered not that the proceedings were nonadversary, again quoting *Frueler* and *Blair.*

In the Sixth Circuit Court of Appeals, to which writ is now requested, in the case of *Cadden v. Welch,* 298 F. 2d 343 (C.A. 6th Cir. 1962), the state court, in a proceeding in which the only interested party was at one time the widow-executrix and sole heir, had determined that certain legal expenses in a will contest were administration expenses. The net effect of this decision was to gain an estate tax deduction for these expenses. The expenses had been paid by the widow who was the only beneficiary. In rejecting the objections of the Commissioner, the court held that the nonadversary nature of the proceedings was immaterial; that the state court had jurisdiction; and that the order was not contrary to local law and was controlling.

In this same Sixth Circuit Court of Appeals, in the instant case, petitioners relied upon the *Cadden* decision and others of the same import. But the Court now appears to hold that federal courts were only bound by state court orders "fixing or characterizing property rights of the persons in interest." The Court of Appeals also held that the Probate Court's findings of a marriage "in fact" were not binding upon the government in a proceeding in which it was not a party.

These objections were raised by the government in *Nashville Trust Co. v. Commissioner,* 136 F. 2d 148 (C. A. 6th Cir. 1943); *Goodwin's Estate v. Commissioner,* 201 F.2d 576 (C.A. 6th Cir. 1953); and *Cadden (supra).* In those instances, the Sixth Circuit Court of Appeals overruled them. These Sixth Circuit Court of Appeals cases cite *Frueler* and *Blair* as authority for conflicting results.

Some cases discuss the correctness or incorrectness of the state court decision. *Blair* appears to hold that is not an issue, as does *Pitts v. Hamrick*, 228 Fed. 486 (C.A. 4th Cir. 1955), but *Estate of Pierpont v. Commissioner*, 336 F. 2d 277 (C.A. 4th Cir. 1964), certiorari denied, 380 U.S. 908 (1965) is to the contrary.

In *Channing v. Hassett*, 200 F. 2d 514 (C.A. 1st Cir. 1952), the Court, in upholding a probate court interpretation of a will, said that the proceedings should not be disregarded altogether but may be given some weight. "At least we can say that the decree . . . gives us some assurance that our own construction of the will . . . is not wide of the mark."

These cases are only samples of the numerous conflicting decisions. Text writers have endeavored to analyze and catalog the cases, but their analyses are no more in agreement than the federal decisions. A lengthy effort is contained in *Mertens, Law of Federal Gift and Estate Taxation*, Vol. 1, Chapter 10.

Another effort at characterization appears in *Taxes—The Tax Magazine*, February, 1963, "State Court Decisions, Federal Taxation, and the Commissioner's Wonderland: The Need for Preliminary Characterization," by Paul A. Teschner.

The case law and literature are as Mr. Teschner says—a "Wonderland." It is a wonderland in which the original rule has been corrupted or lost with the passage of time. Only this Court can restate the rule of *Fruehauf* and *Blair* in contemporary terms.

The Frequency of the Problem Requires the Consideration by This Court

There is a continual flow of decisions of the federal courts, including the Tax Court, in which the effect of state court orders is in dispute. The Commissioner assiduously avoids state court proceedings. It is the policy of the Internal Revenue Service to avoid such proceedings in order that it may disavow them if the result is adverse to the Commissioner. On the other hand, when the result favors the Commissioner, he is a staunch defender of the integrity of state court orders. *Estate of William A. Landers, Sr. v. Commissioner,* 38 T.C. 828 (1962).

With the rise in tax litigation and the continual flood of regulations and rulings issued by the Commissioner, it is apparent that more and more problems will arise in which the application of the federal tax law is dependent upon state law and state court interpretations of state law.

The "Wonderland" can only result in unequal justice, divergent opinions, and inequitable results. It is important to the proper and equal application of the tax law that this matter be resolved.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: February 3, 1966.

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APPENDIX A

68A Stat. 733, 26 U.S.C. §6013

Sec. 6013. *Joint returns of income tax by husband and wife*

(a) Joint returns.—A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

(1) no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien;

(2) no joint return shall be made if the husband and wife have different taxable years; except that if such taxable years begin in the same day and end on different days because of the death of either or both, then the joint return may be made with respect to the taxable year of each. The above exception shall not apply if the surviving spouse remarries before the close of his taxable year, nor if the taxable year of either spouse is a fractional part of a year under section 443(a)(1);

(3) in the case of death of one spouse or both spouses the joint return with respect to the decedent may be made only by his executor or administrator; except that in the case of the death of one spouse the joint return may be made by the surviving spouse with respect to both himself and the decedent if no return for the taxable year has been made by the decedent, no executor or administrator has been appointed, and no executor or administrator is appointed before the last day prescribed by law for filing the return of the surviving spouse. If an executor or administrator of the decedent is appointed after the making of the joint

return by the surviving spouse, the executor or administrator may disaffirm such joint return by making, within 1 year after the last day prescribed by law for filing the return of the surviving spouse, a separate return for the taxable year of the decedent with respect to which the joint return was made, in which case the return made by the survivor shall constitute his separate return.

(b) Joint return after filing separate return.—

(1) In general.—Except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may nevertheless make a joint return for such taxable year. A joint return filed by the husband and wife under this subsection shall constitute the return of the husband and wife for such taxable year, and all payments, credits, refunds, or other repayments made or allowed with respect to the separate return of either spouse for such taxable year shall be taken into account in determining the extent to which the tax based upon the joint return has been paid. If a joint return is made under this subsection, any election (other than the election to file a separate return) made by either spouse in his separate return for such taxable year with respect to the treatment of any income, deduction, or credit of such spouse shall not be changed in the making of the joint return where such election would have been irrevocable if the joint return had not been made. If a joint return is made under this subsection after the death of either spouse, such return with respect to the decedent can be made only by his executor or administrator.

(2) Limitations for making of election.—The election provided for in paragraph (1) may not be made—

(A) unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return; or

(B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or

(C) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court of the United States within the time prescribed in such section; or

(D) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or

(E) after either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122.

(3) When return deemed filed.—

(A) Assessment and collection.—For purposes of section 6501 (relating to periods of limitations on assessment and collection), and for purposes of sec- 6651 (relating to delinquent returns), a joint return made under this subsection shall be deemed to have been filed—

(i) Where both spouses filed separate returns prior to making the joint return—on the date the last separate return was filed (but not earlier than the last date prescribed by law for filing the return of either spouse);

(ii) Where only one spouse filed a separate return prior to the making of the joint return, and

the other spouse had less than $600 of gross income ($1,200 in case such spouse was 65 or over) for such taxable year—on the date of the filing of such separate return (but not earlier than the last date prescribed by law for the filing of such separate return); or

(iii) Where only one spouse filed a separate return prior to the making of the joint return, and the other spouse had gross income of $600 or more ($1,200 in case such spouse was 65 or over) for such taxable year—on the date of the filing of such joint return.

(B) Credit or refund.—For purposes of section 6511, a joint return made under this subsection shall be deemed to have been filed on the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse).

(4) Additional time for assessment.—If a joint return is made under this subsection, the periods of limitations provided in sections 6501 and 6502 on the making of assessments and the beginning of levy or a proceeding in court for collection shall with respect to such return include one year immediately after the date of the filing of such joint return (computed without regard to the provisions of paragraph (3)).

(5) Additions to the tax and penalties.—

(A) Additions to the tax.—Where the amount shown as the tax by the husband and wife on a joint return made under this subsection exceeds the aggregate of the amounts shown as the tax upon the separate return of each spouse—

(i) Negligence.—If any part of such excess is attributable to negligence or intentional disregard of rules and regulations (but without intent to defraud) at the time of the making of such separate return, then 5 percent of the total amount of such excess shall be added to the tax;

(ii) Fraud.—If any part of such excess is attributable to fraud with intent to evade tax at the time of the making of such separate return, then 50 percent of the total amount of such excess shall be added to the tax.

(B) Criminal penalty.—For purposes of section 7206(1) and (2) and section 7207 (relating to criminal penalties in the case of fraudulent returns) the term "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under this subsection after the filing of such separate return.

(C) Treatment of joint return after death of either spouse.—For purposes of sections 21, 443, and 7851(a) (1) (A), where the husband and wife have different taxable years because of the death of either spouse, the joint return shall be treated as if the taxable years of both spouses ended on the date of the closing of the surviving spouse's taxable year.

(D) Definitions.—For purposes of this section—

(1) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(A) if both have the same taxable year—as of the close of such year; and

(B) if one dies before the close of the taxable year of the other—as of the time of such death; and

(2) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married; and

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

68A Stat. 69, 26 U.S.C. §213

Sec. 213. *Medical, dental, etc., expenses*

(a) Allowance of deduction.—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152)—

(1) if neither the taxpayer nor his spouse has attained the age of 65 before the close of the taxable year, to the extent that such expenses exceed 3 percent of the adjusted gross income; or

(2) if either the taxpayer or his spouse has attained the age of 65 before the close of the taxable year—

(A) the amount of such expenses for the care of the taxpayer and his spouse, and

(B) the amount by which such expenses for the care of such dependents exceed 3 percent of the adjusted gross income.

(b) Limitation with respect to medicine and drugs.—Amounts paid during the taxable year for medicine and drugs which (but for this subsection) would be taken into account in computing the deduction under subsection (a) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1 percent of the adjusted gross income.

(c) Maximum limitations.—The deduction under this section shall not exceed $2,500, multiplied by the number of exemptions allowed for the taxable year as a deduction under section 151 (other than exemptions allowed by reason of subsection (c) or (d), relating to additional exemptions for age or blindness); except that the maximum deduction under this section shall be—

(1) $5,000, if the taxpayer is single and not the head of a household (as defined in section 1(b) (2))

and not a surviving spouse (as defined in section 2(b)) or is married but files a separate return; or

(2) $10,000, if the taxpayer files a joint return with his spouse under section 6013, or is the head of a household (as defined in section 1(b) (2)) or a surviving spouse (as defined in section 2 (b)).

(d) Special rule for decedents.—

(1) Treatment of expenses paid after death.—For purposes of subsection (a), expenses for the medical care of the taxpayer which are paid out of his estate during the 1-year period beginning with the day after the date of his death shall be treated as paid by the taxpayer at the time incurred.

(2) Limitation.—Paragraph (1) shall not apply if the amount paid is allowable under section 2053 as a deduction in computing the taxable estate of the decedent, but this paragraph shall not apply if (within the time and in the manner and form prescribed by the Secretary or his delegate) there is filed—

(A) a statement that such amount has not been claimed or allowed as a deduction under section 2053, and

(B) a waiver of the right to have such amount allowed at any time as a deduction under section 2053.

(e) Definitions.—For purposes of this section—

(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

(2) The determination of whether an individual is married at any time during the taxable year shall be made in accordance with the provisions of section 6013(d) (relating to determination of status as husband and wife).

(f) Exclusion of amounts allowed for care of certain dependents.—Any expense allowed as a deduction under section 214 shall not be treated as an expense paid for medical care.

Sec. 213. Medical, dental, etc., expenses.

Amended 1958 as follows:

(a) Allowance of deduction.

There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152)—

(1) if neither the taxpayer nor his spouse has attained the age of 65 before the close of the taxable year, to the extent that such expenses exceed 3 percent of the adjusted gross income; or

(2) if either the taxpayer or his spouse has attained the age of 65 before the close of the taxable year—

(A) the amount of such expenses for the care of the taxpayer and his spouse, and

(B) the amount by which such expenses for the care of such dependents exceed 3 percent of the adjusted gross income.

(b) Limitations with respect to medicine and drugs.

Amounts paid during the taxable year for medicine and drugs which (but for this subsection) would be taken into account in computing the deduction under subsection (2) shall be taken into account only to the extent that the ag-

gregate of such amounts exceeds 1 percent of the adjusted gross income.

(c) Maximum limitations.

Except as provided in subsection (g), the deduction under this section shall not exceed $2,500, multiplied by the number of exemptions allowed for the taxable year as a deduction under section 151 (other than exemptions allowed by reason of subsection (c) or (d), relating to additional exemptions for age or blindness); except that the maximum deduction under this section shall be—

(1) $5,000, if the taxpayer is single and not the head of a household (as defined in section 1 (b) (2)) and not a surviving spouse (as defined in section 2 (b)) or is married but files a separate return; or

(2) $10,000, if the taxpayer files a joint return with his spouse under section 6013, or is the head of a household (as defined in section 1 (b) (2)) or a surviving spouse (as defined in section 2 (b)).

(d) Special rule for decedents.

(1) Treatment of expenses paid after death.

For purposes of subsection (a), expenses for the medical care of the taxpayer which are paid out of his estate during the 1-year period beginning with the day after the date of his death shall be treated as paid by the taxpayer at the time incurred.

(2) Limitation.

Paragraph (1) shall not apply if the amount paid is allowable under section 2053 as a deduction in computing the taxable estate of the decedent, but this paragraph shall not apply if (within the time and in the manner and form prescribed by the Secretary or his delegate) there is filed—

(A) a statement that such amount has not been allowed as a deduction under section 2053, and

(B) a waiver of the right to have such amount allowed at any time as a deduction under section 2053.

(e) Definitions.

For purposes of this section—

(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

(2) The determination of whether an individual is married at any time during the taxable year shall be made in accordance with the provisions of section 6013 (d) (relating to determination of status as husband and wife).

(f) Exclusion of amounts allowed for care of certain dependents.

Any expense allowed as a deduction under section 214 shall not be treated as an expense paid for medical care.

(g) Maximum limitation if taxpayer or spouse has attained age 65 and is disabled.

(1) Special rule.

Subject to the provisions of paragraph (2), the deduction under this section shall not exceed—

(A) $15,000, if the taxpayer has attained the age of 65 before the close of the taxable year and is disable, or if his spouse has attained the age of 65 before the close of the taxable year and is disabled and if his spouse does not make a separate return for the taxable year, or

(B) $30,000, if both the taxpayer and his spouse have attained the age of 65 before the close of the taxable year and are disabled and if the taxpayer files a joint return with his spouse under section 6013.

(2) Amounts taken into account.

For purposes of paragraph (1)—

(A) amounts paid by the taxpayer during the taxable year for medical care, other than amounts paid for—

(i) his medical care, if he has attained the age age of 65 before the close of the taxable year and is disabled, or

(ii) the medical care of his spouse, if his spouse has attained the age of 65 before the close of the taxable year and is disabled, shall be taken into account only to the extent that such amounts do not exceed the maximum limitation provided in subsection (c) which would (but for the provisions of this subsection) apply to the taxpayer for the taxable year;

(B) if the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by him during the taxable year for his medical care shall be taken into account only to the extent that such amounts do not exceed $15,000; and

(C) if the spouse of the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by the taxpayer during the taxable year for the medical care of his spouse shall be taken into account only to the extent that such amounts do not exceed $15,000.

(3) Meaning of disabled.

For purposes of paragraph (1), an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary or his delegate may require.

(4) Determination of status.

For purposes of paragraph (1), the determination as to whether the taxpayer or his spouse is disabled shall be made as of the close of the taxable year of the taxpayer, except that if his spouse dies during such taxable year such determination shall be made with respect to his spouse as of the time of such death.

APPENDIX B

UNITED STATES DISTRICT COURT

Eastern District of Michigan,
Southern Division

HARRY S. STARK AND NATIONAL BANK OF DETROIT, as Co-Executors of the Estate of Louise Tuller Miller, deceased,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 22733

OPINION OF DISTRICT COURT

Appearances:

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Attorneys for Defendant

This is an action to obtain a refund of federal income taxes. It is stipulated by the parties that the only issue before the court is whether Finley P. Miller and Louise Tuller Miller were husband and wife during the calendar years 1957, 1958, and 1959. If they were husband and wife, the advantages of filing joint returns would be available. Finley P. Miller died on May 28, 1960, and Louise Tuller Miller died on September 10, 1960. In order to establish the existence of the marriage, plaintiff, the co-executors of the estate of Louise Tuller Miller, have offered the record of proceedings in the Wayne County Probate Court in the matter of the estate of Finley P. Miller, including the order determining heirs entered on March 1, 1962.

First of all, the court must rule upon the record's admissibility. There are numerous tax cases in which a determination of a state court has been offered, and the district court asked to give it conclusive effect. In such cases, the record has been received so that the effect to be given the determinations contained therein may be considered. See *Cadden v. Welch,* 298 F. 2d 343; *Channing v. Hassett,* 209 F.2d 514. Indeed, it is urged that the effect to be given a determination must depend upon its nature. Clearly the best evidence of the nature of a judicial determination is the record. The record may be admitted to prove the nature of the Probate Court's determination.

The Probate Court held that Louise Tuller Miller was the surviving widow of Finley P. Miller, and therefore his sole heir. Specifically, it was found that their marriage had existed prior to January 1, 1957. This finding was essential since the validity of marriages contracted on January 1, 1957, and thereafter, is made dependent by Michigan law upon the performance of a marriage ceremony, and no evidence of the performance of a marriage ceremony was before the Probate Court. See M.S.A. §25.2.

To supplement the record, plaintiffs have offered the testimony of Harry S. Stark, Jr. Mr. Stark first became acquainted with Louise Tuller Miller in 1946. He handled her tax matters beginning in 1948 and her legal matters generally beginning in 1954 or 1955. He testified that, so

far as he knew, all her business papers and documents of title were in the name Louise Tuller, and he assumed that she was unmarried. However, she never discussed her personal life, and remained a mystery to him. In 1960, he first became acquainted with Mr. Miller, who was suffering from a stroke and unable to speak. He assumed that Mr. Miller was a friend. Apparently, Mr. Miller was not introduced to him as Louise Tuller Miller's husband. The testimony is that Louise Tuller Miller told him of her marriage to Mr. Miller shortly after Mr. Miller's death, and requested that a petition for the administration of Mr. Miller's estate, a petition for the determination of heirs, and a claim for a refund of federal income taxes be prepared, in which she was named as Mr. Miller's widow. There were 24 or 26 thousand dollars in Mr. Miller's estate, despite the fact that Louise Tuller Miller had borne the burden of Mr. Miller's medical and other expenses during the last years of his life, to the amount of some 72 or 74 thousand dollars. Louise Tuller Miller died before the proceedings she initiated could be carried to a conclusion.

The proceedings were carried forward by National Bank of Detroit, as the administrator of Mr. Miller's estate, and National Bank of Detroit and Mr. Stark, as the co-executors of the estate of Louise Tuller Miller, both estates being represented by Mr. Stark's law firm. On October 17, 1960, the Attorney General of the State of Michigan filed an answer to the petition for the determination of heirs. He denied that Louise Tuller Miller had been married to Finley P. Miller, and presented a claim that Mr. Miller's estate had escheated. Through diligent research, the existence of 19 persons distantly related to Mr. Miller was uncovered, and on January 19, 1961, the Attorney General withdrew his claim of escheat. On January 30, 1961, plaintiffs were permitted to file a tardy claim for $72,747.57. Their theory was that, by virtue of a promise implied in law or fact, the amount paid for Mr. Miller's medical and other expenses was to have been repaid—that is, that it did not represent a gift. A guardian ad litem was appointed to review plaintiff's claim. No objection was raised and, on April 25, 1961, the claim was allowed on the recom-

mendation of the guardian ad litem. The findings of the guardian ad litem are interesting in light of the fact that plaintiffs had asserted that Louise Tuller Miller had been married to Finley P. Miller:

> "It seems that Mr. Finley P. Miller was a very close friend of Louise Tuller for many years. Mr. Finley P. Miller died in the year, 1960, and the only heirs that were discovered were distant relatives living outside the State of Michigan and these said relatives were not even acquainted wtih the deceased. On the other hand the evidence in this case clearly shows that Louise Tuller was a close friend of Finley P. Miller for many years and that she had given him large sums of money over the years from 1957 to 1960."

Through allowance of the claim the estate was exhausted, except for $100.00, which was retained to provide for any further costs of administration. On January 9, 1962, and January 30, 1962, the Probate Court received testimony on the petition to determine heirs. This time no guardian ad litem was appointed, and there was no one to oppose plaintiffs' presentation.

Plaintiffs argue that a determination made by a state court in a matter involving state law should be given conclusive effect without regard to the nature of the determination. It is sufficient in their view that the taxpayer has been a party to the case. In the court's opinion, plaintiffs' argument fails to give adequate consideration to the reason for giving conclusive effect to state court determinations, and goes beyond the rule established in the cases of *Freuler v. Helvering,* 291 U.S. 35 and *Blair v. Commissioner,* 300 U.S. 5. In those cases, the test of liability was the existence of the right to receive income. In the *Freuler* case, the state court had held that the taxpayer did not have the right to distributions already received from a trust and ordered him to make restitution. The Supreme Court held that the order of the state court was an order determining the right to receive income, and as such conclusive of liability. In the *Blair case,* the state court had held

that the taxpayer had effectively transferred the right to receive income from a trust. The Supreme Court again held that the decision of the state court was conclusive. Where there has been a final judgment determining property rights, not subject to collateral attack, the rights of the parties can only be what the state court has held them to be. See Restatement, Judgments §110. Yet a determination of some other question in a proceeding in which the United States was not a party or privy to a party would not, under the principles of the law of judgments, be conclusive upon the United States. Even in a proceeding in rem, the judgment is not conclusive as to a fact upon which it is based except between those persons who have actually litigated the question of the existence of the fact. See Restatement, Judgments §73. This distinction between the determination of property rights and the determination of other questions has been recognized by Judge Maris in a careful opinion.

Gallagher v. Smith, 223 F. 2d 218, 222-223.

Plaintiffs argue for a broader rule and rely upon several decisions in the Sixth Circuit in which a state court determination essential to the validity of a claim against an estate has been held conclusive in subsequent proceedings to determine whether the claim was deductible for federal estate tax purposes. *Cadden v. Welch*, 298 F. 2d 343; *Goodwin's Estate v. Commissioner*, 201 F. 2d 576; *Nashville Trust Co. v. Commissioner*, 136 F. 2d 148. These decisions form an apparent extension, although in each case the Court of Appeals carefully reviewed the determination and was satisfied of its correctness. The rule has been etxended in the Third Circuit, so that a determination of the nature of a right in an estate is made conclusive. See *Estate of Darlington v. Commissioner*, 302 F. 2d 693; *Beecher v. United States*, 280 F. 2d 202. Still, in these cases, the determinations have been closely related to property rights in issue in both courts. Plaintiffs' rights in the estate of Finley P. Miller are not in issue here.

If the Government is to have its day in court, it must be afforded the opportunity to cross-examine plaintiffs' wit-

nesses. This is not a case in which the facts are clear. Louise Tuller Miller remained a mystery to Mr. Stark. The witnesses in the Probate Court were not her intimates, and their knowledge of her life was fragmentary. In order for the latent inaccuracies and uncertainties to be exposed, effective cross-examination would be essential. However, plaintiffs chose not to call the witnesses, and requested that the transcript of testimony in the Probate Court be considered instead. Their request must be denied, since any consideration of the testimony in the Probate Court on the issue of the existence of the marriage would deprive the Government of the opportunity to cross-examine.

Furthermore, it appears that plaintiffs, as the co-executors of the estate of Louise Tuller Miller, and National Bank of Detroit, as the administrator of the estate of Finley P. Miller, joined in the submission of the issue of Louise Tuller Miller's marital status and sought a determination that would adversely affect the Government's right to the taxes in issue. Hence, even though the doctrine of the *Freuler* case were applied, the determination would not be entitled to conclusive effect. See *Freuler v. Helvering*, 291 U.S. 35, 45; Restatement, Judgments §91, Comment d. When the Attorney General contested plaintiffs' averments and claimed an escheat, distant relatives were found. The estate then was substantially exhausted through the allowance of plaintiffs' claim, and the only purpose served by the subsequent proceedings was to obtain a favorable determination of Louise Tuller Miller's marital status for use here.

This action has been tried by the court without a jury. The Government's motion for a directed verdict made at the close of plaintiffs' case will be treated as a motion for dismissal on the ground that upon the facts and the law plaintiffs have shown no right to relief. In accordance with the opinion of the court, an order for dismissal will be entered and judgment rendered against plaintiffs.

Fred W. Kaess
United States District Judge

ORDER FOR DISMISSAL

At a session of said Court, held in the Federal Building at Detroit, Michigan, on January 16, 1964.

Present: The Honorable Fred W. Kaess, United States District Judge.

This action came on for trial before the court, and defendant having moved for a directed verdict at the close of the evidence presented by plaintiffs and plaintiffs having shown no right to relief, and the court having considered defendant's motion as a motion for dismissal brought under Rule 41 of the Federal Rules of Civil Procedure;

It is Ordered that the action be dismissed on the merits.

Fred W. Kaess
United States District Judge

JUDGMENT FOR DEFENDANT

This action came on for trial before the court, and the issues having been duly tried and a decision having been duly rendered;

It is Ordered and Adjudged that plaintiffs take nothing, that the action be dismissed on the merits, and that defend- United States of America, recover of plaintiffs, Harry S. Stark and National Bank of Detroit, as co-executors of the Estate of Louise Tuller Miller, deceased, its costs of action.

Dated at Detroit, Michigan, this 16th day of January, 1964.

Frederick W. Johnson
Clerk

APPENDIX C

No. 15940

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

HARRY S. STARK AND NATIONAL BANK OF DETROIT, Co-Executors of the Estate of Louise Tuller Miller,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

OPINION OF COURT OF APPEALS

Decided September 24, 1965.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Plaintiff-appellants are co-executors of the Estate of Louise Tuller Miller. Involved on this appeal is the District Court's dismissal of their suit for refund of federal income taxes assessed against Louise Tuller as a single person for the calendar years of 1957, 1958 and 1959. Determinative of the appellants' lawsuit is the question whether a Probate Court order finding that Finley P. Miller and Louise Tuller had become husband and wife in a common-law marriage prior to 1957 was, by itself, conclusive of such issue in this suit for refund. The return for the year 1957 had been made out in 1958 and the

tax paid by Louise Tuller as a single person. Finley P. Miller died May 28, 1960. After his death, Louise Tuller filed a petition for the probate of his estate, therein describing herself as Louise Tuller Miller, his widow. Upon this petition she was represented by appellant Harry S. Stark who had been Louise Tuller's attorney for many years, knew her as a single woman and had so handled her affairs. The National Bank of Detroit was appointed Special Administrator of Finley P. Miller on June 9, 1960. Thereafter, joint income tax returns for the years 1958 and 1959 were prepared on behalf of Louise Tuller Miller and National Bank of Detroit, as widow and administrator of the deceased Finley P. Miller. An amended return of like import was also filed for the year 1957. The original return for 1957 disclosed a tax liability of Louise Tuller of $10,677.74. By claiming the advantage of a joint return for the years 1957, 1958 and 1959, deductions of some $45,000 of medical expense for the care of Finley P. Miller during several years of his last illness, and by taking credits for overpayment of taxes in previous years by such allegedly married couple, all income tax liability for the years 1958 and 1959 was claimed to be satisfied. Upon review of these returns, the Commissioner assessed deficiencies in the amount of $22,238.11 against the Estate of Louise Tuller Miller, who died in September, 1960.

The assessment was paid by the co-executors of Louise Tuller Miller and this suit for refund followed. The complaint alleged that Louise Tuller Miller and Finley P. Miller were husband and wife in the years involved. The defendant denied such allegation and upon the issue thus drawn the case came on for trial before the District Judge without a jury. Plaintiffs produced no evidence to support the claim of marriage other than an order of the Probate Court of Wayne County, Michigan, determining that the deceased Louise Tuller had been the widow and sole heir at law of Finley P. Miller. They also offered a transcript of the evidence taken in the Probate Court hearing. This transcript was not received as substantive proof but merely as explanatory of what had occurred at the Probate Court

hearing. The effect of other testimony given by appellant Harry S. Stark is set out in the District Court's opinion. Whatever relevancy it had as background, it was clearly hearsay upon the issue of marriage and was correctly treated as such by the District Judge. At the conclusion of plaintiffs' proof, the District Judge dismissed the complaint. His opinion on such dismissal is reported as *Stark v. United States,* 228 F. Supp. 203 (E.D. Mich., 1964). We affirm that decision.

We believe that the District Judge's opinion adequately discusses the facts and law involved, and we supplement it only with the following recital of some additional facts and the procedure followed in the Probate Court. On April 11, 1960, about a month prior to the death of Finley P. Miller, appellant Stark drafted a will for Louise Tuller in which she was identified as a single woman and Finley P. Miller was described as her friend. In none of the proceedings in the Probate Court was the United States or its Commissioner of Internal Revenue sought to be made a party or included in those who were served with notice of the hearings thereon. These proceedings included the petitions for appointment of a general and a special administrator of the Finley P. Miller Estate; the petition for the allowance of appellants' claim for some $70,000 for medical bills of Finley P. Miller paid by Louise, the allowance of which wiped out the $23,000 residue of Finley's estate; and the petition to determine heirs which resulted in the order now relied upon as a finding, binding upon the District Court, adjudicating "as a fact" that Louise and Finley had been husband and wife. The probate record also indicates that notice of the taking of the depositions of various witnesses for use in the Probate Court hearing on the petition to determine heirs was not served on the United States. The transcript of the Probate Court hearing discloses that at one session a representative of the Internal Revenue Department was present and that the Probate Judge advised that he was welcome to take part in the pending hearing. We do not know whether such representative was a government lawyer or whether he had anything more than the status of an interested spectator. He did not appear at a

continued hearing of the matter. We do not consider that the presence of the Internal Revenue representative at one of the hearings made the United States a party to such proceeding.[1]

Plaintiff-Appellants contend that the judgment of the Probate Court thus arrived at concludes further dispute of Louise Miller's marital status in the present suit. Reliance is placed on *Blair v. Commissioner*, 300 U.S. 5, 81 L.Ed. 465 (1937); *Freuler v. Helvering*, 291 U.S. 35, 78 L.Ed. 634 (1934); *Cadden v. Welch*, 298 F(2) 343 (CA 6, 1962); *Goodwin's Estate v. Commissioner*, 201 F(2) 576 (CA 6, 1953); and *Nashville Trust Co. v. Commissioner*, 136 F(2) 148 (CA 6, 1943). The District Judge's detailed analysis of those cases discloses that the state court orders there found to be binding on the United States were all entered in proceedings which called for state court determinations of state law essential to fixing or characterizing property rights of the persons in interest. The complaint here asserts that the Probate Judge "found *as a fact*" the needed marriage relationship and the Probate Judge was specific in saying that "The Court finds *as a fact*" that Louise and Finley were married in at least a common-law relationship prior to January 1, 1957, the date after which no marriage could come into existence under Michigan law except one solemnized by ceremony and pursuant to license.

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[1] While not of controlling importance, it may be interesting to summarize some of the evidence offered in the Probate Court to support its finding of marriage. It presents a bizarre story. Louise and Finley Miller both led highly secretive lives, and Finley at least was known as a "character" by many on downtown Detroit. No claim was made of a valid ceremonial marriage between them. Each lived alone in a different hotel while in Detroit, and Louise held all her property and conducted all her affairs under her maiden name. They were known as man and wife, however, by their chauffeur, their doctor, personnel at Finley's hotel, and Finley's tailor and automobile dealer. It was shown that they visited each other daily and annually made prolonged trips to Florida where they did occupy the same hotel suite. Louise and Finley had each listed the other as spouse and next-of-kin on hospital records. Finley was approximately 95 years old at his death.

We do not think that the interesting procedures employed first to obtain for the Estate of Louise the entire residue of the Estate of Finley, and then to obtain an order declaring Louise his widow, were comparable to the procedures involved in the above-mentioned authorities relied on by appellants. We do not believe that the government is bound in this proceeding by the resolution of *fact* questions in a state court proceeding to which it was not a party.

We affirm the judgment of the District Judge and approve his opinion.

JUDGMENT

(Filed September 24, 1965)

Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

ORDER OF COURT OF APPEALS

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

This Cause is before the Court upon the petition of the plaintiffs-appellants for a rehearing and upon due consideration thereof.

It is Ordered that said petition be and the same is hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 984

HARRY S. STARK AND NATIONAL BANK OF DETROIT, CO-EXECUTORS OF THE ESTATE OF LOUISE TULLER MILLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented by this income tax case is whether Finley P. Miller and Louise Tuller, both now deceased, were husband and wife during the years 1957–1959 as the result of an alleged common law marriage (Pet. 14a). If they were husband and wife, the advantages of filing joint income tax returns for those years would be available to them. In an attempt to sustain their burden of proving this factual issue, petitioners, the co-executors of Louise Tuller's estate, relied almost entirely upon an order entered by the Wayne County Probate Court which, as a part of the proceedings in the estate of Finley P. Miller, found "as a fact" that Louise Tuller and

216-204—66

Finley Miller had been common law husband and wife. At the time this order was secured Mr. Miller's estate was hopelessly insolvent and both Mr. Miller and Louise Tuller were dead. The district court found that the only reason for securing such an order from the Probate Court was to enable Mr. Miller and Louise Tuller to file joint returns for prior years (Pet. 18a). Moreover, in the Probate Court proceeding both Mr. Miller's estate and Louise Tuller's estate were represented by the same law firm and no one appeared to oppose the contention that they had contracted a common law marriage (Pet. 16a).

Petitioners' contention is that, as a matter of law, the lower courts were required to accept the Probate Court determination as conclusive proof of the alleged marriage notwithstanding the facts that (1) the uncontested probate determination was gratuitous in the sense that it was unnecessary to effect the devolution of any property in Mr. Miller's insolvent estate (Pet. 16a, 18a), (2) the only purpose of securing the determination was for use in the instant tax suit (Pet. 18a), and (3) the record in the probate proceeding revealed that substantial evidence disproving the alleged marriage had not been introduced[1] and that the evidence that was introduced was incomplete and inherently unreliable (Pet. 17a–18a). Both courts below properly held that under the circumstances sur-

[1] For example, all of decedent's business papers which identified her as a single woman, and even her will drafted a month before Mr. Miller's death which described Mr. Miller as a "friend," were not introduced as evidence in the Probate Court (Pet. 15a, 22a).

rounding the entry of the order by the Probate Court they were not conclusively bound by that decree and that petitioners had failed otherwise to prove the existence of a common law marriage between Mr. Miller and Louise Tuller (Pet. 13a–24a).

The decision below is correct and there is no ground for further review.

1. Even though the United States was not a party to the probate proceedings and could not be bound under any theory of *res judicata* or collateral estoppel, petitioners argue that it must accept the uncontested factual determination of the Probate Court that the parties were married—no matter how overwhelming the evidence is to the contrary. Petitioners predicate this claim on two decisions of this Court dealing with the relationship between State law and the federal taxing statute. *Freuler* v. *Helvering,* 291 U.S. 35; *Blair* v. *Commissioner,* 300 U.S. 5. This Court has long recognized that "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan* v. *Commissioner,* 309 U.S. 78, 80.

In *Freuler* this Court was called upon to construe a section of the Revenue Act of 1921 which provided that each beneficiary of a trust was taxable on that portion of the trust's annual income which was "distributable to" him:

> * * * pursuant to the instrument or *order* governing the distribution * * * whether or not distributed before the close of the taxable year * * * [*id.* at 40; emphasis supplied].

The Court held that in light of the specific provision of the Revenue Act involved and in the absence of any showing that the State court determination was "collusive in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional * * * tax" (*id.* at 45), the State court's determination that depreciation on trust property was to be deducted prior to distributing the income to the income beneficiaries prevented the Commissioner from taxing the beneficiaries on the gross (undepreciated) income of the trust. In *Blair*, the State appellate court's determination that an interest in a trust was assignable was held to prevent the Commissioner from taxing the assignor on the theory that he had a non-assignable interest in a spendthrift trust. Neither *Freuler* nor *Blair* present a basis for arguing that the federal government is bound by an uncontested and gratuitous factual determination made in the course of court proceedings to which it was not a party.

2. While we agree with petitioners that there appears to be a disagreement in principle among several appellate courts with respect to the effect of State court decrees in federal tax cases, such disagreement as exists involves questions that are unrelated to the question presented by the instant case and review of the instant case would in no way serve to resolve that apparent conflict.

Since *Freuler* and *Blair* there have been a number of appellate court decisions involving the effect to be given to non-adversary legal and factual determinations of

State courts which affect the property subject to tax. All courts would seem to agree that if a State court awards property to A rather than to B, the federal government could not tax the subsequent income to B no matter how insubstantial A's claim to ownership might have been. On the other hand, when the federal question turns, not on who owns the property, but on how he got it, there may be a disagreement among the appellate courts as to the effect that should be given the grounds of decision stated by a State court in a non-adversary proceeding involving the property subject to tax. This question has been most prevalent in estate tax cases where the incidence of tax often turns on whether the decedent's surviving spouse acquired the property from the decedent or through the inaction of other beneficiaries. See 1954 Code § 2056. In such circumstances, most courts have independently examined State law to determine whether the non-adversary nature of the proceedings have resulted in a decree that is in conflict with such law. See, *e.g.*, *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489 (C.A. 2); *Pierpont* v. *Commissioner*, 336 F. 2d 277 (C.A. 4), certiorari denied, 380 U.S. 908; *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760 (C.A. 5); *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (C.A. 9); *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10). On the other hand, at least one circuit appears to require collusion in the nature of fraud before it will make its own independent examination of the issues involved. *Gallagher* v. *Smith*, 223 F. 2d

218 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693 (C.A. 3). However, even that circuit would not accord conclusive effect to a State court decree where, as here, the decree did not relate to property interests previously adjudicated in the State court proceeding. *Dauphin Deposit Trust Co.* v. *McGinnis*, 324 F. 2d 458 (C.A. 3).

Both lower courts correctly held that the State Probate Court's gratuitous determination of an unnecessary factual issue (the marital status of two deceased individuals) which had been secured in a non-adversary proceeding solely for use as evidence in the instant federal tax case is not conclusive evidence against the federal government.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
ROBERT N. ANDERSON,
FRED R. BECKER,
Attorneys.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966